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No. 89-5383

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

MARK HOWLETT, a minor by and through Elizabeth Howlett, his mother, natural guardian and friend,

Petitioner,

v.

SCOTT ROSE, as Superintendent of Schools for Pinellas County, Florida; WILLIAM GREY, THOMAS PETIT, and THE SCHOOL BOARD OF PINELLAS COUNTY, FLORIDA,

Respondents.

On Writ Of *Certiorari* To The District Court Of Appeal Of Florida Second District

PETITIONER'S REPLY BRIEF

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Petitioner submits this brief in response to the arguments advanced by respondents and their supporting *amici*.[1] As discussed more fully below, those arguments largely ignore petitioner's principal contention that the State of Florida may not open its courts to § 1983 actions and then deny full relief to civil rights plaintiffs by recognizing defenses that would not be accepted if the identical action were brought in federal court. Instead, respondents attempt to recast the case in apocalyptic terms that are not suited to this record.

Despite respondents' urging, there is no need to decide whether state courts must accept jurisdiction over § 1983 claims in the face of an "otherwise valid excuse" for two very simple reasons. First, unlike the cases cited by respondents, Florida has not closed its courts to § 1983 claims; rather, it has attempted to shape and limit the § 1983 claims it is otherwise willing to hear. Second, Florida has not presented a "valid excuse" for its half-loaf treatment of § 1983 claims. To the contrary, Florida's sovereign immunity doctrine, as articulated by the Florida Supreme Court, either represents a discrimination against federal claims or a policy disagreement with the drafters of § 1983 over the scope of official liability for constitutional violations. Under the former view, Florida's position is inconsistent with *Testa* v. *Katt*, 330 U.S. 386 (1947). Under the latter view, it is inconsistent with *Mondou* v. *New York, N.H. & H. R.R.*, 223 U.S. 1 (1912). In either event, it cannot be sustained.

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[1] Unless otherwise indicated, the term "respondents" will be used throughout this brief to refer to respondents' *amici*, as well. When separate references are appropriate, citations to respondents' own brief will be preceded by the notation "RB"; citations to the *amicus* brief submitted on behalf of the National Association of Counties, *et al.*, will be preceded by the notation "NAC"; citations to the *amicus* brief submitted on behalf of the Washington Legal Foundation, *et al.*, will be preceded by the notation "WLF."

Respondents' claim that the county school board in this case can be described as an "arm of the state" and thus outside the reach of § 1983, *see Will* v. *Michigan Dep't of State Police*, 109 S.Ct. 2304 (1989), is based on a similarly misguided sense of the relationship between state and federal law in interpreting § 1983. If adopted, it would lead to protracted litigation (in state and federal courts) that is both unnecessary and unwise.

ARGUMENT

I. HAVING OPENED ITS DOORS TO § 1983 CLAIMS, FLORIDA CANNOT IMPOSE BARRIERS TO FULL RELIEF THAT ARE INCOMPATIBLE WITH THE REMEDIAL DESIGN OF THE FEDERAL STATUTE

None of the briefs submitted in this case seriously dispute the proposition that Florida courts can and do routinely hear § 1983 actions against individual defendants.[2] Thus, this is not a case in which Florida has closed its doors to § 1983 claims, or in which this Court is being asked to pry those doors open. Rather, this is a case in which Florida has superimposed a state-created barrier to full relief on § 1983 claims that it is otherwise willing to hear. It is precisely that effort that this Court rejected in *Martinez* v. *California*, 444 U.S. 277 (1980), and *Felder* v. *Casey*, 108 S.Ct. 2302 (1988).

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[2] A partial list of relevant cases is collected in petitioner's opening brief. PB at 19 & n.21. Citing some of the same decisions, respondents' *amici* declare it "clear that Florida courts will entertain Section 1983 actions against individuals . . . ." NAC at 8 (footnote omitted). Respondents themselves do not take any position on the issue; on the other hand, they do not present any contrary authority. RB at 3-4. Nor do respondents dispute that some appellate courts in Florida have continued to entertain § 1983 suits against local governmental units in plain disagreement with the decision below. PB at 18 n.19.

The distinction is fundamental and should not be obscured in a semantic debate over jurisdictional objections versus immunity defenses.[3] It is one thing for a state to decline to hear § 1983 cases at all. It is quite another thing for a state, like Florida, to entertain § 1983 claims and then attempt to shape the contours of the federal cause of action. As the Court recognized in *Martinez* and *Felder*, the Supremacy Clause was designed to ensure a uniform interpretation of federal law regardless of forum. That goal would be thwarted if respondents prevail.

What respondents seek is nothing less than the right to enforce § 1983 in piecemeal fashion based on state law concerns. The jurisprudence of this Court does not permit that result. *See Maine* v. *Thiboutot*, 448 U.S. 1, 11 (1980) (attorney's fees are "part of the § 1983 remedy whether the action is brought in state or federal court"). At a minimum, the Supremacy Clause requires the state courts "to proceed in such a manner that all the substantial rights of the parties under controlling federal law [are] protected." *Garrett* v. *Moore-McCormack*, 317 U.S. 239, 245 (1942).[4] That standard is not met so long as the Florida courts only permit constitutional claims to be asserted against individual defendants.

Finally, the fact that the Florida courts are willing to entertain § 1983 suits against individual defendants dis-

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[3] *See* NAC at 7. Under Florida law, the circuit courts have general jurisdiction over "*all* actions at law not cognizable by the county courts." Fla.Stat. § 26.012(2) (a) (emphasis added).

[4] The Supremacy Clause, of course, binds state judges as well as state and local political officials. Indeed, the Supremacy Clause expressly provides that "the judges in every state shall be bound by [the Constitution and laws of the United States], anything in the constitution or laws of any state to the contrary notwithstanding." U.S. Const., Art. VI.

tinguishes this case from the FELA decisions relied on by respondents. Each of those cases involved a neutral state rule that barred any and every aspect of plaintiff's federal claim, either because the statute of limitations had run[5] or on *forum non conveniens* grounds.[6] Here, what Florida has done is akin to accepting jurisdiction with reservations—namely, the right to insulate certain defendants from liability that would otherwise attach under § 1983. Nothing in the FELA cases supports that result.

II. RESPONDENTS HAVE FAILED TO ARTICULATE A "VALID EXCUSE" SUFFICIENT TO JUSTIFY THE DECISION BELOW, EVEN IF VIEWED IN JURISDICTIONAL TERMS

This Court has noted that states may decline jurisdiction over FELA claims if the decision to do so is based on an "otherwise valid excuse." *See* nn.5 & 6, *supra*. The Court has also noted, however, that an excuse will not be deemed "valid" if it discriminates against federal claims, *Testa* v. *Katt*, 330 U.S. 386 (1947), or reflects a substantive disagreement with federal policy, *Mondou* v. *N.H. & H. R.R.*, 223 U.S. 1 (1912). Florida's invocation of sovereign immunity in this case fails at least one, and perhaps both, of these tests.[7] For this reason as well, the FELA deci-

[5] *Herb* v. *Pitcairn*, 324 U.S. 117 (1945) (limitations period was not extended by plaintiff's improper filing in state court of limited jurisdiction rather than in court of general jurisdiction).

[6] *Douglas* v. *New York, N.H. H. R.R.*, 279 U.S. 377 (1929); *Missouri ex rel Southern Ry.* v. *Mayfield*, 340 U.S. 1 (1950).

[7] Contrary to the elaborate arguments submitted by respondents' *amici*, the court below never considered these federal questions because it deemed the issue of sovereign immunity purely a matter of state law. (Pet.App.2-3). As discussed at length in petitioner's opening brief, PB at 7-16, this fundamental misperception is enough to require reversal.

sions cited by respondents do not support the decision below.

A. Florida's Sovereign Immunity Rules, As Applied In This Case, Discriminate Against § 1983 Claims

Respondents devote a great deal of effort to establishing a purported disagreement among the parties regarding the proper interpretation of Florida's sovereign immunity law.[8] It is a false debate. Petitioner is quite prepared to accept respondents' contention that Florida has retained the concept of sovereign immunity for "discretionary" governmental acts.[9] But that premise does not support respondents' conclusion that Florida's extension of sovereign immunity to the sort of constitutional

[8] *See* NAC at 13-15.

[9] *Id.* at 14. It is worth noting, however, that Florida law is not quite as clear as respondents portray it. As one commentator has observed: "Obviously much confusion still exists regarding governmental tort liability in Florida." Comment, "The Florida Supreme Court's View of State Sovereign Immunity: An Exercise in Confusion Producing Restrictive Results," 15 Stet. L. Rev. 831, 850 (1986). In particular, the notion that Florida's generalized waiver of sovereign immunity does not extend to discretionary acts was most clearly articulated in *Trianon Park Condominium Association, Inc.* v. *City of Hialeah*, 468 So.2d 912 (Fla.1985), and eight other cases decided on the same day. None of those nine cases, however, was even cited in *Hill* v. *Dep't of Corrections*, 513 So.2d 129 (Fla.1987), *cert. denied*, 108 S.Ct. 1024 (1988), as support for its holding that sovereign immunity remains a continuing bar to § 1983 suits against state agencies in the Florida state courts.

Petitioners do not believe that the uncertainty in Florida law over the precise scope and rationale of the sovereign immunity defense should affect the outcome of this case. Should the Court disagree, however, the proper recourse would be to remand to the Florida courts for clarification. *Cf. Virginia* v. *American Booksellers Association, Inc.*, 108 S.Ct. 636 (1988).

claims embraced by § 1983 is the product of a neutral, nondiscriminatory rule. Indeed, the discrimination inherent in Florida's rule is highlighted by respondents' attempt to bring § 1983 within the "discretionary" act exception.

As this Court stated in *Owen* v. *City of Independence*, 445 U.S. 622, 649 (1980):

> [A]n understanding of the rationale underlying the common-law immunity for "discretionary" functions explains why that doctrine cannot serve as the foundation for a good-faith immunity under § 1983. That common-law doctrine merely prevented courts from substituting their judgment on matters within the lawful discretion of the municipality. But a municipality has no "discretion" to violate the Federal Constitution; its dictates are absolute and imperative. And when a court passes judgment on the municipality's conduct in a § 1983 action, it does not seek to second-guess the "reasonableness" of the city's decision nor to interfere with the local government's resolution of competing policy considerations. Rather, it looks only to whether the municipality has conformed to the requirements of the Federal Constitution and statutes.

It is not surprising, therefore, that the Florida cases cited by respondents have nothing to do with § 1983 and are all easily distinguishable on their facts.[10] For example, in *Carter* v. *City of Stuart*, 468 So.2d 955 (Fla.1985), plaintiff sued the city for its alleged failure to enforce an animal control ordinance after being bitten by a dog that had escaped from a private yard. In explaining why the case was dismissed on sovereign immunity grounds, the Florida Supreme Court wrote: "How and in what manner those laws are enforced is, in most instances, a judgmental decision of the executive branch." *Id.* at 957. In *Ursin* v. *Law Enforcement Ins. Co., Ltd.* 450 So.2d 1282 (2d DCA 1984), *approved*, 469 So.2d 1382 (Fla.1985), plaintiff sued the state for negligence after being kidnapped by an escaped convict who she alleged had been improperly assigned to a kitchen detail. The case was likewise dismissed on sovereign immunity grounds because the court concluded that the decision on "how and what manner" to classify prisoners was a discretionary one. Similarly, in *Conover* v. *Board of County Commissioners*, 527 So.2d 946 (3d DCA 1988), the court held that the decision on "how and what manner" to place a traffic signal at a particular intersection was shielded by sovereign immunity because it involved a discretionary planning judgment.[11]

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[10] *See* NAC at 14 nn.14 &15.

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[11] The other cases cited by respondents as evidence of a discretionary act exception to Florida's sovereign immunity waiver fit a similar pattern. None involved constitutional claims. *See Rosenberg* v. *Kriminger*, 469 So.2d 879 (3d DCA 1985) (suit against police for misrepresentation based on conduct of an official investigation); *Everton* v. *Willard*, 468 So.2d 936 (Fla.1985) (suit against police for failing to arrest drunk driver who was subsequently involved in a traffic accident); *Delgado* v. *City of Miami Beach*, 518 So.2d 968 (3d DCA 1988) (suit against city for injuries resulting from city's allegedly negligent failure to prevent private use of fireworks at a city concert); *Parker* v. *Murphy*, 510 So.2d 990 (1st DCA 1987) (suit charging prison officials with negligence for their assignment of an escaped convict to a work maintenance crew); *Palumbo* v. *Game & Fresh Water Comm.*, 487 So.2d 352 (1st DCA 1986) (suit against state officials for failing to erect a barrier that would have confined alligator to state park-grounds); *City of Delray Beach* v. *Watts*, 461 So.2d 142 (4th DCA 1984), *rev. denied*, 475 So.2d 696 (Fla.1985) (suit against city officials for siting of a garbage dumpster); *Dep't of Transportation* v. *Neilson*, 419 So.2d 1071 (Fla.1985) (suit alleging negligent failure to install adequate traffic control devices at a busy intersection); *Rumbough* v. *City of Tampa*, 403 So.2d 1139 (2d DCA 1981) (suit challenging

Here, petitioner has alleged that respondents violated his Fourth Amendment and due process rights. The obligation to obey those commands is not discretionary and cannot be compared with the decision on where to place a traffic signal or whether to allocate scare police resources to enforce an animal control ordinance. Conversely, respondents have not identified any Florida cases where sovereign immunity was invoked to defeat a tort claim based on a nondiscretionary duty other than in the § 1983 context. In short, respondents' detailed exploration of the discretionary act doctrine in Florida law does not refute the notion that § 1983 claims have been singled out for special and unfavorable treatment.[12]

B. Florida's Sovereign Immunity Rules, As Applied In This Case, Reflect A Substantive Disagreement With Federal Policy Embodied In § 1983

A second, possible interpretation of Florida's sovereign immunity law is that it shields even nondiscretionary acts

placement of city landfill); *Elliott* v. *City of Hollywood*, 399 So.2d 507 (4th DCA 1981) (suit charging city with failure to enforce municipal ordinance barring homeowners from growing bushes that obstruct motorist's view); *Payne* v. *Palm Beach County*, 395 So.2d 1267 (4th DCA 1981) (suit challenging county's failure to extend its road or build a guardrail); *Ellmer* v. *City of St. Petersburg*, 378 So.2d 825 (2d DCA 1979) (suit charging city with negligent failure to cordon off riot area).

[12] The discriminatory judgment inherent in Florida's treatment of § 1983 claims is perhaps most clearly expressed in the *amicus* brief of the Washington Legal Foundation, which argues that the decision below is justified because "§ 1983 causes of action are more likely to be frivolous than are other suits," WLF at 17, and thus the state courts are under no duty to entertain them. Petitioner does not accept this characterization of § 1983 suits. However, even in correct, it does not excuse state discrimination against federal law claims.

if they are deemed "governmental" in nature.[13] Petitioner believes that view misstates Florida law.[14] But whether or not Florida law includes a concept of "governmental" immunity that would extend to the facts of this case, it is clear that Congress made a different choice when it enacted § 1983. Florida is free to disagree with that choice. It is not free to undermine federal law by shielding local governments from liability for their constitutional wrongs.

As noted in petitioner's opening brief, PB at 9-11, the relationship of § 1983 to common law concepts of "governmental" immunity was fully explored by this Court in *Owen*. And, in *Owen*, the Court unequivocally rejected the argument that a broad-based concept of "governmental" immunity somehow survived passage of § 1983:

> [T]he municipality's "governmental" immunity is obviously abrogated by the sovereign's enactment of a statute making it amenable to suit. Section 1983 was just such a statute. By including municipalities within the class of "persons" subject to liability for violations of the Federal Constitution and laws, Con-

[13] Respondents obliquely refer to this "governmental" immunity, NAC at 14, by noting that under state law Florida and its subdivisions are liable in tort "in the same manner and to the same extent as a private individual acting under like circumstances." Fla. Stat. § 768.28(5).

[14] The effort to discover a broad "governmental" immunity in Florida law is particularly ironic since Florida was one of the first states to repudiate the notion of "governmental" immunity as an absolute defense in tort actions. *See Hargrove* v. *Town of Cocoa Beach*, 96 So.2d 130 (Fla.1957). Moreover, in *Trianon Park Condominium Association, Inc.* v. *City of Hialeah*, 468 So.2d 912, 920 (Fla. 1985), the Florida Supreme Court was careful to stress that the surviving vestiges of "governmental" immunity are inextricably tied to the exercise of discretion.

> gress—the supreme sovereign on matters of federal law—abolished whatever vestige of the State's sovereign immunity the municipality possessed.

445 U.S. at 647-48 (footnote omitted).

Moreover, the theory of *Owen* clearly applies to state courts as well as federal courts, for reasons best stated by this Court more than 75 years ago:

> The suggestion that [an] act of Congress is not in harmony with the policy of the state, and therefore that the courts of the state are free to decline jurisdiction, is quite inadmissible, because it pre-supposes what in legal contemplation does not exist. When Congress, in the exertion of the power confided to it by the Constitution, adopted [its] act, it spoke for all the people and all the states, and thereby established a policy for all. That policy is as much a policy of [the state] as if the act had emanated from its own legislature, and should be respected accordingly in the courts of the state.

Mondou, 223 U.S. at 57.

Put in the language of *Mondou*, any judgment by Florida that its local governmental bodies cannot be held liable for their constitutional wrongs is "quite inadmissible" because it represents nothing more than a substantive disagreement with the contrary judgment of the 42nd Congress that enacted § 1983.[15] Such disagreements do not represent a "valid excuse" for declining to hear federal law claims. *Id.* Nor is respondents' cause helped by FELA cases where the state's reliance on statute of limitations provisions or the doctrine of *forum non conveniens* was found to constitute a "valid excuse." *See* nn.5 & 6, *supra*. To the contrary, those cases merely establish that a "valid excuse" may be found where the state's jurisdictional choices are nondiscriminatory and do not conflict with federal law. The decision below satisfies neither prerequisite.

[15] Seventy years ago, Justice Holmes already deemed it "plain that a state cannot escape its constitutional obligations by the simple device of denying jurisdiction in such cases to courts otherwise competent." *Kenney* v. *Supreme Lodge*, U.S. 411, 415 (1920), *citing General Oil Co.* v. *Crain*, 209 U.S. 211 (1908).

III. THE QUESTION OF WHETHER CONGRESS IMPOSED MANDATORY STATE JURISDICTION OVER § 1983 CLAIMS NEED NOT BE REACHED IN THIS CASE

Respondents contend that the history of § 1983 does not support mandatory state jurisdiction over § 1983 claims.[16] That question, however, need not be reached in this case.[17] First, Florida has not closed its doors to § 1983 claims. *See* Point I, *supra*. Second, in the absence of a "valid excuse," the obligation to assume jurisdiction over federal claims is not derived from statute but from the Constitution itself. *McKnett* v. *St. Louis & S.F. Railway*, 292 U.S. 230, 233-34 (1934).[18] In particular, the principle of nondiscrimination has been recognized by this Court as an inescapable consequence of the Supremacy Clause. *Testa* v. *Katt*, 330 U.S. 386, 389 (1947).

In any event, respondents' historical argument against mandatory jurisdiction proves too much. If respondents are correct that § 1983 was intended to be an exclusive

[16] *See* NAC at 16-25.

[17] This Court has identified but not decided the question of mandatory jurisdiction in at least two other § 1983 cases. *See Maine* v. *Thiboutot*, 448 U.S. 1, 3 n.1 (1980); *Martinez* v. *California*, 444 U.S. 277, 283 n.7 (1980).

[18] *See also Burrell* v. *Mississippi State Tax Comm.*, 536 So.2d 848 (Miss.1988).

federal remedy, NAC at 21, then state courts would lack even concurrent jurisdiction over § 1983 claims. Yet, as respondents acknowledge, the appropriateness of concurrent jurisdiction is firmly established by this Court's decisions. NAC at 22. Moreover, respondents place too much emphasis on the language of the 1871 Act, which created § 1983 and provided for "such proceedings to be prosecuted in the several district or circuit courts of the United States."[19] Respondents stress the fact that this language does not mention state jurisdiction. However, it is at least equally significant that the drafters of § 1983 did not duplicate the language of the 1866 Civil Rights Act, a predecessor statute adopted only five years earlier, which had given jurisdiction to the federal courts "exclusively of the courts of the several states."[20]

Lacking statutory support for the claim that states should be free to accept, reject, or shape § 1983 actions however they choose, respondents fall back on the vague plea of federalism. It does not work in this case. First, § 1983 was adopted by a Congress that was openly distrustful of the former Confederate states. *See Patsy* v. *Florida Board of Regents*, 457 U.S. 496, 506 (1982). At the very least, it is counterintuitive to suggest that Congress intended to grant those same states the right to limit the remedies available under § 1983 as they saw fit. Second, federalism is and must be a two-way street. Under certain circumstances it requires federal respect for state interests; under other circumstances it requires state respect for federal concerns. Given the unique historical circum-

[19] Civil Rights Act of 1871, ch. 22 § 1, 17 Stat. 13.

[20] Civil Rights Act of 1866, ch. 31, § 3, 14 Stat. 27. *See generally*, Steinglass, *Section 1983 Litigation in State Courts* (1988), at § 9.2(b)(2).

stances that gave birth to § 1983, it is this latter meaning of federalism that should be given paramount value here. Third, the state interests at stake in this case are vastly overstated. There is no doubt that the Civil War Amendments and the statutes that implemented them, like § 1983, dramatically altered federal-state relations in this country. That fight, however, is long behind us. The question of where those rights can be enforced is, at best, a derivative issue. Finally, the interests of federalism are not advanced by rules of law that convert federal judges into the sole guarantors of constitutional behavior by state and local officials. To the contrary, that outcome undermines state sovereignty rather than promoting it. *See Smith* v. *Wade*, 461 U.S. 30, 92 (1983) (Rehnquist, J., dissenting).

IV. THERE IS NO NEED FOR FURTHER PROCEEDINGS TO DETERMINE THAT THE COUNTY SCHOOL BOARD IS A "PERSON" FOR § 1983 PURPOSES

It is undisputed that the county school board in this case is empowered by state law to issue bonds, Fla.Stat. § 236.37, and levy taxes, Fla.Stat. § 236.25.[21] Respondents nonetheless argue that the school board should be treated as an arm of the state and thus outside the reach of § 1983. *Cf. Will* v. *Michigan Dep't of State Police*, 109 S.Ct. 2304 (1989).[22] In a variation on that theme, respondents' *amici* argue that further proceedings are necessary to determine whether the school board can be properly characterized as a local governmental body for § 1983 purposes.[23] Neither contention has merit.

[21] *See* RB at 12; NAC at 28.

[22] *See* RB at 10-15.

[23] *See* NAC at 28.

Underlying both contentions is the erroneous implication that the school board's amenability to suit under § 1983 is a matter of state law. State law determines the duties bestowed on particular persons and agencies. *Cf. City of St. Louis* v. *Prapotnik*, 108 S.Ct. 915 (1988). But whether those duties are sufficient to impose liability under § 1983 is a matter of federal law. *See Will*, *supra*.[24]

In this case, the school board possesses the same key fiscal powers that this Court relied on in rejecting the school board's Eleventh Amendment defense in *Mt. Healthy City Board of Ed.* v. *Doyle*, 429 U.S. 274, 280-81 (1977). In addition, "local school boards [in Florida] have substantial responsibility for managing schools in their districts." NAC at 27. And while it is true that the school board in this case receives "some guidance" and "a significant amount of money" from the state, those factors were also present in *Mt. Healthy* and not deemed decisive. 429 U.S. at 280.

Under *Mt. Healthy*, the presence of independent funding powers and substantial managerial responsibilities is more than enough to bring the county school board within the scope of § 1983. When those factors are missing, it may be appropriate to conduct a more searching examination of the relevant state laws. Given their presence in this record, the Court should refrain from endorsing a procedure that would create yet another round of satellite litigation in § 1983 cases.

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[24] For that reason, the fact that a state chooses to describe a particular governmental body as a political subdivision of the state cannot be determinative. Otherwise, states could defeat a wide variety of § 1983 claims merely by *ipse dixit*.

CONCLUSION

For the reasons stated herein, and in petitioner's opening brief, the judgment below should be reversed.

Respectfully submitted,

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